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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,

v.

DIANA L. SPIRT, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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CONSENT TO FILING

This Amici brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

PRELIMINARY STATEMENT

The American Council on Education submits this brief as *amicus curiae* in support of the petition for writ of certiorari filed herein by Teachers Insurance and Annuity Association and College Retirement Equities Fund. Consent for the filing of this brief has been obtained from

counsel for all parties and has been filed with the Clerk of this Court. This brief stresses the need for a final decision on the question of retroactive relief uniformly applicable in all jurisdictions and binding upon all owners of annuity contracts issued nationwide by TIAA-CREF. For the reasons stated herein, this Court should grant certiorari and review the ruling of the Second Circuit.

INTEREST OF THE *AMICUS CURIAE*

The American Council on Education ("ACE") is the principal, independent nonprofit coordinating body for post-secondary education in the United States. Its members comprise 1,700 colleges, universities, and national and regional education associations. The ACE serves as the principal organization of college and university administrators with institution-wide responsibilities, notably presidents, chancellors, and heads of postsecondary associations. Among its charter purposes is to serve education for the common welfare.

A substantial number of ACE's college and university members have retirement programs funded through TIAA-CREF annuities. TIAA-CREF annuities are particularly tailored to the needs of individual members of the academic community. Moreover, the uniform administration of TIAA-CREF's standard individual annuity contracts fosters career mobility of professors and administrators (through portability of their retirement benefits) among more than 3,400 educational institutions throughout the United States. As more fully set forth below, the lack of a definitive ruling applicable throughout the TIAA-CREF system threatens this uniformity of benefits and pension administration to the detriment of over 700,000 employees of higher education. ACE's Board of Directors has consistently opposed retroactivity, an issue that will be fully briefed and argued by the Parties if the petition for certiorari is granted.

SUMMARY OF THE ARGUMENT

The ACE urges this Court to grant TIAA-CREF's Petition herein because without a definitive ruling from this Court the nationwide TIAA-CREF system will likely face divergent decisions in the various circuits relating to the appropriate relief to be granted. Until all such questions are resolved, all TIAA-CREF annuitants (retired and unretired) will be subjected to uncertainty in the terms of their retirement benefits. It is also possible that the higher education retirement system could be fragmented with some annuitants entitled to greater benefits than others, even though similarly situated. It could thus become more attractive to retire from a school in one Circuit than from one in another, restricting freedom of faculty mobility which is uniformly acknowledged as one of the most attractive aspects of the present uniform TIAA-CREF system.

ARGUMENT

This Court Should Grant Certiorari And Decide, For The Benefit Of All Annuitants And Institutions In The TIAA-CREF System, Whether The Relief Granted Below Was Proper

The litigation involving TIAA-CREF's use of sex-distinct mortality tables in the calculation of annuity benefits has existed for over ten years, with eight actions in addition to *Spirt* presently pending against those insurers in various federal courts. *See* Petition at 12 n.4. The controversy which has embroiled those nonprofit insurers and their annuitants will not end, however, if the pending petition is denied. Other plaintiffs in other Circuits would, in that event, remain free to seek varying forms of relief. This Court should grant certiorari and finally determine the question of the appropriate measure of relief for all TIAA-CREF annuitants and participating

institutions so that this issue, which has remained unresolved in a number of federal courts for more than a decade, may no longer plague this nationwide pension system. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 404 (1979); *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 377 U.S. 235, 237 (1964).

The uniformity in benefit rates and contract terms that exists within the entire TIAA-CREF system is one of its most important and attractive aspects. Job mobility is commonplace in higher education, and is an important guarantor of academic freedom. Professors and instructors often teach at a number of institutions during the course of their careers, act as visiting professors at other institutions, go on sabbatical leave, work for the government, and so forth. The freedom to move from one institution to another, unfettered by concern over forfeiture of pension benefits or the financial ability of a particular institution to fund future pension benefits, is most valuable. The TIAA-CREF annuity system serves this important end admirably.

Once qualifying for a TIAA-CREF annuity, an employee may continue to contribute to it whether employed in higher education or not. While over 3,400 institutions presently fund their pension programs through TIAA-CREF annuities, if an employee transfers to a nonparticipating institution, his or her own contributions may continue if desired, but in no event will benefits be lost if contributions cease. When transferring from one participating institution to another, an annuitant need only inform TIAA-CREF of the change to assure that future contributions from the new employer are properly credited. No additional paper work or waiting period is required. Finally, each dollar contributed to a TIAA-

CREF annuity from whatever source purchases the same level of benefits[1] whether earned at the largest state institution or the smallest private junior college.

The ACE believes that nothing should be done to threaten the uniformity of the TIAA-CREF system and the resulting free portability of annuity benefits. A definitive ruling by this Court establishing the guidelines for relief would end any further efforts to obtain relief different from that, if any, which this Court would find appropriate. Denial of certiorari would not put the issue to rest or assure uniformity of treatment among the 700,000 contract holders in the TIAA-CREF system. Other plaintiffs in other actions against TIAA-CREF may not accept, with no other *quid pro quo*, the Second Circuit's determination of the appropriate form of relief.

Two results detrimental to individual TIAA-CREF annuitants could flow from efforts to obtain varying forms of relief: (1) the system will remain in a state of flux until all questions of relief (pending in remaining TIAA-CREF actions or in new actions to be filed) are resolved; and (2) if different measures of relief are awarded against TIAA-CREF, those insurers will be faced with the decision either to confine the costs (and benefits) of such relief to the particular class of plaintiffs there involved or make any necessary changes in all annuity contracts systemwide. If it proved imprudent or impossible to make systemwide changes each time a lower court decides that additional or different relief should be awarded to a particular sub-group of annuitants from the awarded by a

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[1] Contributions to TIAA-CREF credited on or after August 1, 1983 purchase benefits that do not differ on the basis of the sex of the beneficiary. Consistent with this Court's ruling in *Arizona Governing Committee* v. *Norris*, 103 S.CT. 3492 (1983), pre-August 1, 1983 contributions continue to purchase sex-distinct benefits.

different lower court, the uniformity within the TIAA-CREF system could be lost.

In short, there is a need for one date to be established for compliance with this Court's ruling on liability announced in *Norris*. The annuitants whose retirement decisions are closely tied to the level of their pension benefits deserve to have that certainty of benefits which would flow from a definitive ruling from this Court. Without a common date for compliance all employer-sponsored pension plans, large and small, could become subject to differing obligations (without basis for differentiation) of the same type that threatens the TIAA-CREF system.

CONCLUSION

For all the foregoing reasons, the ACE urges the Court to grant TIAA-CREF's Petition for Certiorari, and to review with systemwide applicability, the May 21, 1984 and September 29, 1982 decisions of the Second Circuit.

Respectfully submitted,

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